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DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER PABLO PAULINO,

Defendant.

Criminal Case No. 10-00062

**ORDER AND OPINION RE:
MOTION TO SUPPRESS
STATEMENTS**

This case is before the court on a Motion to Suppress Statements (“the Motion”) filed by Defendant CHRISTOPHER PABLO PAULINO (“Defendant”). *See* Docket No. 13. After reviewing the filings and relevant case law, and hearing oral argument and witness testimony, the court hereby **DENIES** the Motion and issues the following opinion.

I. FACTUAL BACKGROUND

On February 20, 2010, Defendant arrived at AB Won Pat International Airport on a flight originating from the Philippines. Docket No. 17-1 at 1. Upon suspicion that Defendant was concealing ice in his rectal area, Guam Customs and Quarantine Agency (“Customs”) officers detained Defendant at the airport. *Id.*

Drug Enforcement Administration (“DEA”) Special Agent Kirk Williamson (“Agent Williamson”) entered the Customs pat down room where Defendant was being held and read Defendant his *Miranda* rights. *Supp’n Hrg.*, Test. of Agent Williamson (Feb. 17, 2011) (hereinafter *Feb. 17 Hrg.*). Defendant stated that he understood his rights and asserted his right to an attorney;

1 accordingly, Agent Williamson refrained from questioning Defendant. *Id.*

2 That same day, Customs Officer Jeffrey Palacios (“Officer Palacios”) obtained a warrant to
3 conduct an x-ray examination of Defendant. *See* Docket No. 14 at 16–17. The x-ray results
4 indicated that there was a foreign object in Defendant’s rectal area. Docket No. 16 at 2.

5 On February 22, Defendant (having yet to pass the foreign object) appeared before Judge
6 Elizabeth Barrett-Anderson in the Superior Court of Guam for a continued arraignment and was
7 charged with possession of a controlled substance. Docket Nos. 13 at 3, 17 at 1:26–27. Judge
8 Barrett-Anderson appointed Public Defender Terrance Long (“Attorney Long”) as Defendant’s
9 attorney and ordered Defendant to remain in the custody of Customs. Docket No. 13 at 3.

10 On the evening of February 22, Customs Officer Franklin Gutierrez (“Officer Gutierrez”)
11 went to check on Defendant, who had still not passed the foreign object. *Feb. 17 Hrg.*, Test. of
12 Officer Gutierrez. Officer Gutierrez told Defendant that he was not going to ask any questions, but
13 he was concerned about Defendant’s health and the negative consequences that could occur if
14 Defendant continued to keep the object in his rectum. *Id.* Defendant told Officer Gutierrez that he
15 wanted to speak to Officer Gutierrez’s supervisor, Chief Raffaele Sgambelluri. *Id.* Defendant then
16 told Chief Sgambelluri that he knew what he had to do and that he would pass the object. *Id.* When
17 Officer Gutierrez was escorting Defendant to the bathroom, Defendant began crying and making
18 incriminating statements. *Id.* Officer Gutierrez told Defendant that he should wait to speak his
19 attorney, and Defendant stated that he understood and stopped making statements. *Id.* Defendant
20 then went into the bathroom and passed the foreign object. *Id.*

21 On February 24, 2010, Assistant Attorney General Basil O’Mallan (“Attorney O’Mallan”)
22 contacted Attorney Long and told him that Defendant wanted to meet with him. *Id.*, Test. of
23 Attorney Long. Attorney Long contacted Customs, and Officer Palacios informed him that
24 Defendant was willing to cooperate with the officers. *Id.*; *see also* Docket No. 17-1 at 3. Officer
25 Palacios further stated that he told Defendant that he needed to speak with his attorney before
26 answering questions. Docket No. 17-1 at 3. Attorney Long then arranged to meet with Defendant
27 the following day. *Feb. 17 Hrg.*, Test. of Attorney Long.

1 On February 25, 2010, Attorney Long met with Defendant at the Customs Tiyan office. *Feb.*
2 *17 Hrg.*, Test. of Attorney Long. After consulting with Defendant, Attorney Long spoke with
3 Attorney O'Mallan (via telephone) about a plea agreement. *Id.* Based on oral assurances from
4 Attorney O'Mallan that Defendant would only be prosecuted locally and that the minimum sentence
5 would be recommended, Attorney Long told Officer Palacios that Defendant would cooperate. *Id.*,
6 Tests. of Attorney Long and Officer Palacios. Defendant was standing next to Attorney Long when
7 Attorney Long indicated that Defendant would cooperate.¹ *Id.*, Test. of Attorney Long.

8 Attorney Long then told Defendant that he was leaving and left. *Id.* Shortly thereafter,
9 Officers Palacios and Gutierrez began interviewing Defendant and, after an adequate break,
10 completed the interview the following evening ("the two-day interrogation"). *Id.*, Test. of Officer
11 Palacios. During the two-day interrogation, Defendant confessed to, among other things, the instant
12 offense. *See* Docket No. 17-1 at 9.

13 **II. DISCUSSION**

14 Defendant moves the court to suppress statements that he made to Customs officers during
15 the two-day interrogation. *See* Docket No. 14. Defendant contends that the statements were
16 obtained in violation of his Fifth and Sixth Amendment rights because (1) Customs officers failed
17 to readvise him of his *Miranda* rights, and (2) he never waived his right to have counsel present
18 during the two-day interrogation.

19 **A. SUFFICIENCY OF MIRANDA WARNING**

20 It is undisputed that Special Agent Williamson advised Defendant of his *Miranda* rights on
21 February 20, 2010. *See* Docket Nos. 17 at 1, 50 at 1. Defendant, however, argues that Customs
22 officers were required to readvise him of his *Miranda* rights prior to beginning the two-day
23

24 ¹ At the Suppression Hearing, Officers Palacios and Gutierrez could not recall if Defendant
25 was standing next to Attorney Long or in a holding cell when Attorney Long indicated that
26 Defendant would cooperate. However, Attorney Long testified that Defendant was in fact standing
27 next to him. As the fact finder, the court determines the credibility of witnesses and finds that
Attorney Long's recall of the situation is credible. *See United States v. Wright*, 625 F.3d 583,
603–04 (9th Cir. 2010) (finding that the district court failed to make credibility determinations at
the suppression hearing and reversing its suppression ruling).

1 interrogation.

2 **1. APPLICABLE STANDARDS**

3 To comply with the Fifth Amendment protection against self-incrimination, “the accused
4 must be adequately and effectively apprised of his rights and the exercise of those rights must be
5 fully honored.” *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Accordingly, before a person is
6 interrogated, he must be apprised of his right to remain silent and his right to consult with an
7 attorney and have an attorney present during the interrogation. *Id.* at 467–68.

8 There is no per se rule as to when or if an accused must be readvised of his *Miranda* rights.
9 *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995) (“The courts have generally rejected
10 a per se rule as to when a suspect must be readvised of his rights . . .”). Rather, the court must look
11 at the totality of the circumstances and whether the facts “suggest the effectiveness of the earlier
12 *Miranda* warnings was diminished.” *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1128–29
13 (9th Cir. 2005) (citing *Wyrick v. Fields*, 459 U.S. 42, 48–49 (1982), *Guam v. Dela Pena*, 72 F3d
14 767, 770 (9th Cir. 1995)).

15 **2. DEFENDANT DID NOT NEED TO BE READVISED OF HIS RIGHTS**

16 Defendant relies on the passage of time to support his argument that Customs officers were
17 required to readvise him of his *Miranda* rights prior to beginning the two-day interrogation. *See*
18 *Supp’n Hrg.*, Arg. of Def. Counsel (May 25, 2011) (hereinafter *May 25 Hrg.*). However, the mere
19 passage of time is insufficient to demonstrate that the effectiveness of the earlier warning was
20 diminished. *See Dela Pena*, 72 F.3d at 770 (approving a fifteen hour lapse between initial warning
21 and questioning); *Andaverde*, 64 F.3d at 1313 (approving a one day lapse); *Maguire v. United States*,
22 396 F.2d 327 (9th Cir. 1968) (finding a warning given three days earlier was adequate) .

23 Although the Ninth Circuit has not approved a five-day lapse between an initial warning and
24 questioning, looking at the totality of the circumstances, there is nothing in the record that indicates
25 that the effectiveness of Agent Williamson’s warning was diminished. *See Rodriguez-Preciado*, 399
26 F.3d at 1129. If anything, the effectiveness of the initial warning was enhanced by: (1) the
27 arraignment on February 22; (2) Officer Gutierrez’s reminder to Defendant that he should wait to

1 speak to his attorney before making statements; and (3) Defendant's consultation with his attorney
2 immediately preceding the two-day interrogation.

3 Agent Williamson's *Miranda* warning was not stale. Thus, the fact that Customs officers
4 did not readvise Defendant of his *Miranda* rights before beginning the two-day interrogation does
5 not render Defendant's statements inadmissible. However, it is undisputed that Defendant asserted
6 his right to attorney after Agent Williams read the warning. Therefore, whether Defendant's
7 statements are admissible turns on whether Defendant waived his right to have counsel present
8 during the interrogation.

9 **B. WAIVER OF MIRANDA**

10 Defendant contends that the statements made to Customs officers during the two-day
11 interrogation were obtained in violation of his Fifth and Sixth Amendment rights, and therefore
12 inadmissible at trial. Specifically, Defendant argues that he did not waive his right to have his
13 attorney present during the two-day interrogation.

14 **1. APPLICABLE STANDARDS**

15 If an accused asserts his right to an attorney, officers must cease questioning until an attorney
16 is present, unless the accused initiates communication. *Edwards v. Arizona*, 451 U.S. 477, 482
17 (1981) (citing *Miranda*, 384 U.S. at 474). The policy underlying the *Edwards* rule is "to prevent
18 police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Montejo*
19 *v. Louisiana*, at 8 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)) (internal quotation marks
20 omitted).

21 If, after invoking his right to counsel, a defendant makes statements to officers without his
22 attorney present, the court must engage in a two-step analysis to determine if statements are
23 admissible. The court must determine whether (1) "the accused himself initiate[d] further
24 communication, exchanges, or conversations with the [officers]"; and (2) the accused "voluntarily,
25 knowingly and intelligently" waived his right to counsel. See *United States v. Jennings*, 515 F.3d
26 980, 986 (9th Cir. 2008) (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983); *Miranda*,
27 384 U.S. at 444) (internal quotations omitted).

1 Under the Sixth Amendment, once adversary judicial proceedings commence, a defendant
2 has a guaranteed “right to have counsel present at all ‘critical’ stages of the criminal proceedings.”
3 *Montejo v. Louisiana*, 556 U.S. ___, ___, 129 S. Ct. 2079, 2085 (2009) (citing *United States v.*
4 *Wade*, 388 U.S. 218, 227–28 (1967)). Interrogation by government officers is considered such a
5 “critical” stage. *See id.* (citing *Massiah v. United States*, 377 U.S. 201, 204–05 (1964); *United*
6 *States v. Henry*, 447 U.S. 264, 274 (1980)).

7 The protection of the Fifth Amendment right to have counsel present during an interrogation
8 under *Miranda* and *Edwards* adequately protects a defendant’s right to have counsel present under
9 the Sixth Amendment. *See id.* at ___, 129 S. Ct. at 2090 (overruling *Michigan v. Jackson*, 475 U.S.
10 625 (1986)). Thus, the court’s analysis and findings regarding an alleged Fifth Amendment
11 violation simultaneously addresses an alleged Sixth Amendment violation. *See id.*; *see also Kemp*
12 *v. Ryan*, No. 08-99030, 2011 U.S. App. LEXIS 8663, at *30 n.5 (9th Cir. Apr. 28, 2011) (“The Court
13 commented that because the right to be free from compelled self-incrimination and the right to
14 counsel are waived using the same procedure, . . . doctrines ensuring voluntariness of the Fifth
15 Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.”)
16 (quoting *Montejo*, 556 U.S. at ___, 129 S. Ct. at 2090) (alteration in original) (internal quotation
17 marks omitted).

18 **1. DEFENDANT INITIATED COMMUNICATION WITH OFFICERS**

19 A defendant initiates communication with an officer when “his words and deeds . . . can be
20 ‘fairly said to represent a desire’ to ‘open up a more generalized discussion relating . . . to the
21 investigation.’” *Mickey v. Ayers*, 606 F.3d 1223, 1235 (9th Cir. 2010) (quoting *Bradshaw*, 462 U.S.
22 at 1045). However, statements and questions regarding “routine incidents of the custodial
23 relationship” are generally insufficient to initiate communication. *Bradshaw*, 462 U.S. at 1044– 45
24 (holding that defendant initiated further communication by merely asking, “[w]ell, what is going to
25 happen to me now?”)

26 In this case, there are two instances in which Defendant initiated communication with
27 Customs officers. First, Defendant initiated communication on February 22, when he told Officer

1 Sgambelluri that he knew what he had to do and that he would pass the foreign object, and then
2 made incriminating statements to Officer Gutierrez prior to passing the foreign object.

3 Second, Defendant initiated communication through his attorney on February 25, when
4 Attorney Long indicated to Customs officers that Defendant would cooperate with them. Defendant
5 was standing next to Attorney Long and did not refute Attorney Long's statement that Defendant
6 was going to cooperate.² In both of these instances, Defendant initiated communication in that his
7 words and conduct indicated a desire to discuss the investigation.

8 Defendant relies on *Edwards* for his contention that Customs officers could not question him
9 without his attorney present because he invoked his right to an attorney. *See* Docket No. 50.
10 However, in putting forth his argument, Defendant overstates the prophylactic rule and glosses over
11 its caveat—officers may not question a defendant who invokes his right to an attorney without his
12 attorney present, “*unless [Defendant] himself initiates further communication.*” *Edwards*, 451 U.S.
13 at 482 (emphasis added). As discussed above, Defendant initiated communication with Customs
14 officers. Thus, whether Defendant's statements are admissible now turns on whether Defendant
15 waived his right to have counsel present during the two-day interrogation.

16 **2. DEFENDANT VOLUNTARILY, KNOWINGLY AND**
17 **INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL**

18 The Government has the burden of proving by a preponderance of the evidence that
19 Defendant waived his right to counsel. *Colorado v. Connelly*, 479 U.S. 157, 168–69 (1986). A
20 waiver need not be express, *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), however, merely
21 responding to police-initiated questioning is insufficient to establish a waiver. *Edwards*, 451 U.S.
22 at 484.

23 The court must look at “the totality of the circumstances, including the background,
24 experience, and conduct of defendant” to determine if a waiver is made voluntarily, knowingly, and
25 intelligently. *Rodriguez-Preciado*, 399 F.3d at 1127 (quoting *United States v. Doe*, 155 F.3d 1070,

26 ² Even if Defendant was not standing next to Attorney Long at this time, the fact that
27 Attorney Long told Customs Officers that Defendant would cooperate was sufficient to find that
Defendant initiated communication through his attorney.

1 1074 (9th Cir.1998)) (internal quotation marks omitted).

2 A waiver is voluntary³ if the confession was “the product of a free and deliberate choice
3 rather than coercion or improper inducement,” and it is knowing and intelligent if “it is made with
4 a full awareness of both the nature of the right being abandoned and the consequences of the
5 decision to abandon it.” *Id.* at 1127–28 (quoting *Doe*, 155 F.3d at 1074) (internal quotation marks
6 omitted). *See also United States v. Mejia*, 559 F.3d 1113, 1117 (9th Cir. 2009) (“The voluntariness
7 of a waiver depends on the absence of police overreaching.”) (citing *Connelly*, 479 U.S. at 170).

8 There is nothing in the record indicating that Defendant was coerced or improperly induced
9 into answering Customs officers’ questions.⁴ In fact, the record reflects quite the opposite. Customs
10 officers exercised an abundance of caution in observing Defendant’s rights. Even after Defendant
11 initiated communication, Customs officers advised him that he should speak to his attorney before
12 making statements. Defendant freely chose to cooperate with Customs officers.

13 The fact that Defendant asserted his right to an attorney and remained silent after Agent
14 Williamson read him his rights indicates that Defendant understood his rights. Defendant later
15 consulted with Attorney Long and was standing next to him when Attorney Long told the Customs
16 Officers that Defendant was going to cooperate. There is nothing in the record indicating that
17 Defendant objected to Attorney Long’s statement or otherwise acted to the contrary. Defendant then

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19 ³ The government applies 18 U.S.C. § 3501 in its analysis of whether Defendant’s confession
20 was voluntary. *See* Docket No. 48. However, in *Dickerson v. United States*, the Supreme Court
21 held that the statute was unconstitutional. 530 U.S. 428 (2000). Accordingly, the court does not
22 apply the statute in its analysis, but rather relies on case law to determine whether Defendant’s
23 waiver was voluntary.

24 ⁴ Defendant argues that the length of his detention essentially amounted to coercion. *May*
25 *Hrg.*, Arg. of Def Counsel. The court is unpersuaded by this argument. The x-ray results
26 indicated that there was a foreign object in Defendant’s rectal area, thus making it reasonable for
27 Customs to detain him until he had a bowel movement. *See Montoya de Hernandez*, 473 U.S. at 544
([T]he detention of a suspected alimentary canal smuggler at the border is analogous to the
detention of a suspected tuberculosis carrier at the border: both are detained until their bodily
processes dispel the suspicion that they will introduce a harmful agent into this country.”) Any
discomfort Defendant may have suffered as he suppressed his bowel moving tendencies was not
coercion. Rather, it was self-inflicted in that it “resulted solely from the method by which
[Defendant] chose to smuggle illicit drugs into this country.” *See id.*

1 answered questions from Customs officers over a period of two days. While merely answering
2 questions is insufficient to establish a waiver, Defendant clearly did more than just answer questions.

3 Defendant argues that “the fact that [he] spoke with his attorney did not constitute a waiver
4 of his Fifth Amendment rights.” Docket No. 50 at 3. In *Minnick v. Mississippi*, the Supreme Court
5 held that after a defendant invokes his right to counsel, officers cannot reinitiate questioning without
6 counsel present even if the defendant has consulted with his attorney. 498 U.S. 146, 153 (1990).
7 As discussed in the foregoing, Defendant did more than just speak to his attorney.

8 In *Minnick*, the defendant asserted his right to an attorney and then spoke with his lawyer
9 two or three times. *Id.* at 149. Subsequent to that, a deputy sheriff went to the jail to question the
10 defendant, and the jailers told the defendant that he “would have to talk” to the sheriff and that he
11 “could not refuse.” *Id.* (internal quotation marks omitted). The state supreme court found that
12 because an attorney was made available to the defendant, his Fifth Amendment right to counsel was
13 satisfied, and thus the court did not address the issue of initiation. *Id.* at 150.

14 This case is distinguishable from *Minnick* in two major respects. First, and most importantly,
15 unlike the defendant *Minnick*, Defendant initiated communication with the Customs officers.
16 *Minnick* reiterated that a defendant was not foreclosed from waiving his right to counsel under
17 *Edwards*, provided that the defendant is the one who initiates the communication. *Id.* at 156.

18 Second, the nature of Defendant’s interaction with his attorney is markedly different. In
19 *Minnick*, officers coerced the defendant into answering questions when his attorney was not present.
20 Although the defendant consulted with his attorney on two or three occasions, the *Minnick* court was
21 concerned that merely consulting with an attorney would “not remove the suspect from persistent
22 attempts by officials to persuade him to waive his rights, or from the coercive pressures that
23 accompany custody.” *Id.* at 153.

24 Here, the record wholly lacks the “coercive pressures” underlying the *Minnick* decision.
25 Defendant consulted with his attorney immediately prior to the interrogation and was even standing
26 next to Attorney Long when Attorney Long indicated to Customs officers that Defendant was going
27 to cooperate. Defendant had the benefit of his counsel when he made the decision to cooperate with

1 Customs officers. Thus, Defendant's reliance on *Minnick* is misplaced.

2 **3. CONCLUSION**

3 Defendant was advised of his *Miranda* rights, and Customs officers did not need to readvise
4 him of his rights prior to commencing the two-day interrogation. Although Defendant asserted his
5 right to an attorney, he initiated communication with Customs officers and then voluntarily,
6 knowingly, and intelligently waived his right to have counsel present during the two-day
7 interrogation. Accordingly, the court hereby **DENIES** the Motion to Suppress Statements.

8 Furthermore, the court amends the Amended Trial Scheduling as follows:

- 9 • Trial Documents Filing Deadline: June 10, 2011, at 3:00 p.m.
10 • Pretrial Conference: June 13, 2011, at 9:00 a.m.
11 • Jury Trial: June 21, 2011, at 9:30 a.m.

12 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jun 07, 2011